DECLO PRODUCE, INC. v. SUN VALLEY POTATOES, INC.
PACA Docket No. R-99-0175.
Decision and Order filed April 6, 2000.

George S. Whitten, Presiding Officer.
Complainant, Pro se.
Respondent, Pro se.
Decision and Order issued by William G. Jenson, Judicial Officer.

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which Complainant seeks an award of reparation in the amount of $6,520.65 in connection with transactions in interstate commerce involving potatoes.

Copies of the Report of Investigation prepared by the Department were served upon the parties. A copy of the formal complaint was served upon Respondent which filed an answer thereto denying liability to Complainant. Respondent's answer included a counterclaim in the amount of $16,296.25, which was in part based on transactions which were not covered by the formal complaint. Complainant filed a reply to the counterclaim denying any liability thereunder.

The amount claimed in neither the formal complaint nor counterclaim exceeds $30,000.00, and therefore the documentary procedure provided in the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case as is the Department's Report of Investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement, Respondent filed an answering statement, and Complainant filed a statement in reply. Respondent filed a brief.

Findings of Fact

1. Complainant, Declo Produce, Inc., is a corporation whose address is P. O. Box 100, Declo, Idaho. At the time of the transactions involved herein Complainant was licensed under the Act.

2. Respondent, Sun Valley Potatoes, Inc., is a corporation whose address is P.O. Box 59, Paul, Idaho. At the time of the transactions involved herein Respondent was licensed under the Act.

3. On or about September 23, 1998, under its invoice 2150, Complainant sold to Respondent, and shipped from loading point in Declo, Idaho, to Respondent in Paul, Idaho, one truck load consisting of 792 50lb. bags of Idaho Russet Nugget potatoes, at $4.50 per bag, or $3,564.00, f.o.b. The parties agreed that the potatoes were to be U.S. No. 2 grade. Respondent accepted the potatoes at destination in

Paul, Idaho, and has not paid Complainant any part of the purchase price.

4. On or about September 23, 1998, under its invoice 2151, Complainant sold to Respondent, and shipped from loading point in Declo, Idaho, to Respondent in Paul, Idaho, one truck load consisting of 792 50lb. bags of Idaho Russet Nugget potatoes, at $4.50 per bag, or $3,564.00, f.o.b. The parties agreed that the potatoes were to be U.S. No. 2 grade. Respondent accepted the potatoes at destination in Paul, Idaho, and has paid Complainant $2,998.75, leaving $565.25 still owing.

5. On or about September 23, 1998, under its invoice 2152, Complainant sold to Respondent, and shipped from loading point in Declo, Idaho, to Respondent in Paul, Idaho, one bulk truck load consisting of 46,820 pounds of Idaho Russet Nugget potatoes, at $6.00 per cwt., or $2,809.20, f.o.b. The parties agreed that the potatoes were to be U.S. No. 2 grade. Respondent accepted the potatoes at destination in Paul, Idaho, and has paid Complainant $1,872.80, leaving $936.40 still owing.

6. On or about September 25, 1998, under its invoice 2159, Complainant sold to Respondent, and shipped from loading point in Declo, Idaho, to Respondent in Paul, Idaho, one truck load consisting of 850 50lb. bags of Idaho Russet Nugget potatoes, at $4.50 per bag, or $3,825.00, f.o.b. The parties agreed that the potatoes were to be U.S. No. 2 grade. Respondent accepted the potatoes at destination in Paul, Idaho, and paid Complainant $2,550.00, leaving $1,275.00 still owing.

7. On or about September 23, 1998, under its invoice 2160, Complainant sold to Respondent, and shipped from loading point in Declo, Idaho, to Respondent in Paul, Idaho, one truck load consisting of 400 50lb. bags of Idaho Russet Nugget potatoes, at $4.50 per bag, or $1,800.00, f.o.b. The parties agreed that the potatoes were to be U.S. No. 2 grade. Respondent accepted the potatoes at destination in Paul, Idaho, and paid Complainant $1,620.00, leaving $180.00 still owing.

8. On or about September 15 and 16, 1998, Respondent shipped to Complainant a total of 2,072 cwt. of processing grade potatoes to be packed into 50 pound bags of U.S. No. 2 potatoes. Complainant has not accounted to Respondent for these potatoes.

9. The formal complaint was filed on March 25, 1999, which was within nine months after the causes of action therein accrued. The formal counterclaim was filed on May 11, 1999, which was within nine months after the causes of action alleged therein accrued.

Conclusions

Complainant seeks to recover reparation from Respondent in connection with the sale of five shipments of potatoes for prices totaling $15,562.20. Complainant asserts that Respondent has paid a total of $9,041.55, leaving $6,520.65 still due. Respondent disputed each of the shipments, and filed a counterclaim for a total of $16,296.25 arising partly from transactions covered by the complaint, and partly

from other transactions that are extraneous to the complaint. Complainant did not reply individually to the matters raised in Respondent's counterclaim, but simply termed them "fabricated nonsense," and "smoke mirrors" (sic). We turn first to the matters alleged in the formal complaint.

Under invoices 2150 and 2151 Complainant sold identical loads to Respondent. Respondent asserted that only one load was shipped, and that the fact that the invoices showed the same quantity, product, and date proved this fact. Respondent, therefore, did not pay any part of the purchase price of the load represented by invoice 2150. However, Complainant submitted copies of both bills of lading, and while the trucker's name was the same on both invoices (the party's places of business are only 12 miles apart) the signatures of the trucker differed so as to show that he signed for two different loads. We find that Respondent is liable for the full purchase price of the load represented by invoice 2150, or $3,564.00.

Respondent presents several defenses as to the load represented by invoice 2151. Respondent alleges that the load was not inspected at shipping point as required by the applicable marketing order; that 72 cartons out of the load were shipped by Respondent to Sysco Food Service in Horsehead, New York, and were found to contain excessive rot on arrival, but that it was not economially feasible to get an inspection for such a small number of cartons; and that "portions of Lot #2151 were repacked in [Respondent's] warehouse and the remaining portion was returned to Declo Produce." Except for the first of these defenses (as to which the burden might fairly be said to be upon Complainant to show compliance with the marketing order) Respondent's defenses are unproven. It is particularly remarkable that Respondent made no effort to show what portion of the load was repacked in Respondent's warehouse and what portion returned to Complainant. However, a more fundamental problem exists with Respondent's case. The Uniform Commercial Code provides that "where a tender has been accepted the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy."[1] Complainant has alleged that it received no timely notice of breach. Respondent responded that timely notice was given, but provided no documentation of such notice. Complainant reiterated its assertion that no timely notice was given in its reply to the counterclaim, and in its statement in reply. The burden of proving by a preponderance of the evidence that prompt notice was given rests upon Respondent.[2] We find that Respondent has not met that burden, and is barred from any remedy for any breach.

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[1]UCC § 2 - 607(3)(a).

[2]*Hunts Point Tomato Co., Inc. v. Maryland Fresh Tomato Co., Inc.*, 47 Agric. Dec. 773 (1988), *overruled on other grounds by, Diazteca Co. v. The Players Sales, Inc.*, 53 Agric. Dec. 909 (1994); *Welchel Produce Co. v. Rosenberg*, 15 Agric. Dec. 452 (1956).

The bulk load of potatoes represented by invoice number 2152 was invoiced at $6.00 per hundredweight, and shipped on September 23, 1998, to Respondent at its place of business in Paul, Idaho. Respondent accepted the load on arrival, but now claims that the amount invoiced should have been $4.00 per hundredweight. Respondent has not shown that it objected promptly to the Complainant's invoice showing the price of $6.00 per hundredweight. We find that the price was $6.00 per hundredweight, and that Respondent has not proven prompt notice of any breach of contract by Complainant. Respondent is liable for the balance of the purchase price on this load, or $936.40.

The load of 850 50 pound bags of potatoes represented by invoice number 2159 was shipped by Complainant on September 25, 1998. Respondent claims that the load was shipped directly from Complainant's place of business to Respondent's customer, Hiatt Produce, Inc., in St. Charles, Illinois. However, the bill of lading signed by the carrier clearly shows that the load was consigned to Respondent at Paul, Idaho. Again, Respondent claims a breach by Complainant as to this load, but has not proven by a preponderance of the evidence that it gave prompt notice of a breach to Complainant. We conclude that Respondent is liable to Complainant for the balance of the purchase price as to this load, or $1,275.00.

On September 23, 1998, Complainant shipped a load of 400 50 pound bags of potatoes at $4.50 per bag, or $1,800.00, to Respondent under invoice number 2160. Again, Respondent asserts that these potatoes went directly from Respondent's place of business to Respondent's customer Haitt Produce. However, the bill of lading shows that the shipment was to Respondent at Paul, Idaho. Respondent asserts a breach by Complainant, but has not shown by a preponderance of the evidence that it gave Complainant prompt notice of a breach. Respondent is liable to Complainant for the balance of the purchase price as to this load, or $180.00. The total that we have found due from Respondent to Complainant on the five loads that are the subject of the complaint is $6,520.25.

We now turn to Respondent's counterclaim. As a background to this claim, it should be recalled that Complainant failed to respond particularly to the individual allegations of the counterclaim, but asserted that it was "fabricated nonsense." We will take this to be a denial of the matters alleged in the counterclaim.

The first matter alleged by Respondent (exhibits 30 and 31[3]) is that 4,800 bags of 12,800 bags received by Respondent from Complainant were overpriced by $.30 per bag. Respondent states that communication to resolve the price difference was broken off when Complainant filed its complaint. Respondent asserts that "evidence of the bag count is supported on Exhibit 30 for 1515 Two Good bags and Exhibit 31 for 3294 Two Good bags for a total of 4809 bags." The two exhibits referred to are a federal inspection certificate, and an inspector's notes. There is no showing, or indeed allegation, that the overpriced bags were ever paid for by

[3]Exhibits referenced are those attached to Respondent's answer and counterclaim.

Respondent. We conclude that Respondent has failed to prove by a preponderance of the evidence that any amount is owing to it from Complainant as to the bags.

Respondent next alleges that 2,072 hundredweight of potatoes were delivered to Complainant by Respondent on September 15, and 16, 1998, to be packed as U.S. No. 2 grade into Respondent's bags (exhibit 1). Respondent submitted documentation showing the delivery to Complainant of the poundage alleged to have been shipped. Complainant's general denial will not suffice as a defense to this allegation. Respondent claims $2.00 per hundredweight for a pack-out of 1,554 hundredweight, or $3,108.00. We conclude that this amount is owing from Complainant to Respondent.

Respondent next asserts that a load of potatoes was received from Complainant, rejected by Respondent's in-house federal inspectors, and returned to Complainant (exhibit 3). Respondent asserts that the load was refused by Complainant because there was no room on their floor to unload the potatoes. Respondent asserts that the load was shipped without having been inspected at shipping point, and that "a load delivered without inspection, rejected by USDA as out of grade is an act of misbranding." Respondent has not submitted a copy of any inspection certificate. We have held many times that the only way to prove a breach as to condition is by a neutral inspection of produce,[4] and just as we will not accept testimonial evidence of an interested party as to condition, we will also not accept testimonial evidence of an interested party to establish that a neutral inspection was performed, or as to what were the results of the alleged inspection. This count of Respondent's counterclaim must fail for want of adequate proof. Respondent's next allegation (exhibit 4) is apparently based on the breach alleged above, and must also fail.

Respondent's next claim (exhibit 5) relates to an alleged rejection of potatoes by its in-house federal inspectors. Again, Respondent failed to submit a copy of the federal inspection certificate, and consequently, Respondent's claim must fail.

In connection with Complainant's invoice 2161 (exhibits 6 and 7) Respondent claims that it has paid Complainant, but is entitled to damages. Respondent asserts that Complainant shipped 6 ounce Nugget potatoes when 10 ounce Burbank potatoes were ordered, and that its customer only returned $160.00, causing it to loose $1,340.00. However, Respondent did not submit a purchase order showing that 10 ounce Burbanks were ordered, nor did Respondent allege that it objected in a timely fashion to Complainant's invoice which clearly showed 6 ounce Nuggets. Moreover, Respondent's own invoice to its customer only says: "50# Burlap Bag U.S. Two Good." In addition Respondent did not submit an accounting from its customer showing the loss. Respondent's claim as to this load is denied.

Respondent's next two claims (exhibits 8 and 9) relate to Complainant's invoices 2152 and 2159. Respondent's contentions relative to these invoices have

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[4] *Gordon Tantum v. Phillip R. Weller*, 41 Agric. Dec. 2456 (1982); *O. D. Huff, Jr., Inc. v. Pagano & Sons*, 21 Agric. Dec. 385 (1962).

already been dealt with, and Respondent's claims are without merit.

Respondent claims damages of $2,600.07 in connection with potatoes shipped under Complainant's invoice 2144 on September 19, 1998 (exhibit 10). Respondent states that the potatoes were shipped by Complainant to Respondent and unloaded by Respondent at its place of business in Paul, Idaho. 300 bags of an original 864 bags were then shipped by Respondent to a customer in Massachusetts where a federal inspection on September 23, 1998, showed excessive rot. Respondent accepted the potatoes by unloading them in Paul, Idaho. The f.o.b. warranty of suitable shipping condition is applicable only to contract destination. Complainant's invoice (submitted by Respondent) shows the contract destination as Respondent's place of business in Paul, Idaho. There has been no showing that the parties contemplated an extension of the warranty to a distant point such as Massachusetts. We conclude that Respondent has not shown a breach on the part of Complainant as to this load of potatoes.

Respondent's last two claims (exhibits 11 and 13) relate to Complainant's invoices 2151 and 2160, and have already been dealt with. These claims are without merit.

As stated earlier, the total that we have found due from Respondent to Complainant on the five loads that are the subject of the complaint is $6,520.25. The total amount due from Complainant on Respondent's counterclaim is the $3,108.00 found due as to one count. The remainder of the counterclaim is dismissed. When these two amounts are offset against each other, the sum of $3,412.25 remains owing from Respondent to Complainant. Respondent's failure to pay Complainant this amount is a violation of section 2 of the Act.

Section 5(a) of the Act requires that we award to the person or persons injured by a violation of section 2 of the Act "the full amount of damages sustained in consequence of such violations." Such damages include interest.[5] Since the Secretary is charged with the duty of awarding damages, he also has the duty, where appropriate, to award interest at a reasonable rate as a part of each reparation award.[6] We have determined that a reasonable rate is 10 percent per annum.

Complainant was required to pay a $300.00 handling fee to file its formal complaint. Pursuant to 7 U.S.C. 499e(a), the party found to have violated Section 2 of the Act is liable for any handling fees paid by the injured party.

Order

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[5] *L & N Railroad Co. v. Sloss Sheffield Steel & Iron Co.*, 269 U.S. 217 (1925); *L & N Railroad Co. v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916).

[6] See *Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Company, Inc.*, 29 Agric. Dec. 978 (1970); *John W. Scherer v. Manhattan Pickle Co.*, 29 Agric. Dec. 335 (1970); and *W. D. Crockett v. Producers Marketing Association, Inc.*, 22 Agric. Dec. 66 (1963).

Within 30 days from the date of this order respondent shall pay to complainant, as reparation, $3,412.25, with interest thereon at the rate of 10% per annum from October 1, 1998, until paid, plus the amount of $300.

Copies of this order shall be served upon the parties.
